Big Man Management Sdn Bhd v Tenaga Nasional Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-138–07 OF 2016
AHMAD KAMAL J
30 APRIL 2020

Utilities — Electricity — Tampering of meters — Whether electricity meter installations tampered on plaintiff's premises between years 2013 and 2015 — Whether provisions of Electricity Supply Act 1990 ('the ESA 1990') required written notice to be delivered to plaintiff — Whether disconnection of electricity supply at plaintiff's premises illegal — Electricity Supply Act 1990 s 38 (3) & (4)

Tort — Defamation — Damages — Whether defendant's representative made defamatory statement against plaintiff — Officers of electricity supplier made statements to third party — Whether statements defamatory in nature and/or malicious — Whether statements referred to user's reputation — Whether statement published to third person — Whether all elements of defamation fulfilled

The plaintiff's claim against the defendant was for the damages suffered by the plaintiff due to the disconnection of electricity supply to its premises. The defendant conducted inspections on the meter installation at the plaintiff's premises on 4 December 2013 and 6 May 2014. On 23 June 2014 and 25 June 2014, the defendant had issued two notices of disconnection of electricity supply in Form A Schedule as a result of the inspection. The said disconnection of supply notices stated that the supply of the electricity would be disconnected on 24 June 2014 and 26 June 2014 respectively. The disconnection of the supply of the electricity did not occur on that specified dates. On 1 July 2014, the defendant issued to the plaintiff a disconnection notices for Lot 140216 ('MSB 1') and Lot 140216-1 ('MSB 2') which were the plaintiff's premises at Jalan Berjaya 8/1, Perindustrian Taman Berjaya, 81200 Skudai Johor and disconnected the electricity supply to the plaintiff's premises ('the first disconnection of supply'). The defendant only resumed the supply of the electricity for both MSB 1 and MSB 2 on 1 October 2014. On 27 July 2014, the plaintiff received four letters of demand from the defendant claiming for the loss of revenue based on the allegations that the tampering and/or modifications has been made to the meters at the plaintiff's premises. The defendant issued a disconnection notice dated 7 April 2015 for MSB 1 and MSB 2 based on the inspection dated 15 October 2014 for MSB 1 and 7 January 2015 for MSB 2. The defendant disconnected electricity supply from the plaintiff's premises on 8 April 2015. On 7 April 2015, the plaintiff received

notices to disconnect electricity supply at the plaintiff's premise and on 8 April 2015, the defendant disconnected the electricity supply to the plaintiff's premises. The defendant only resumed the supply of the electricity for both MSB 1 and MSB 2 on 14 May 2015. The defendant had prepared and signed a letter of undertaking with Sunshine Merchants Sdn Bhd on 21 May 2015 regarding the plaintiff's account with the defendant. On the 8 September 2015, the plaintiff through its solicitor delivered a letter of demand to the defendant to seek an explanation for the defendant's action and was responded via a letter dated 19 August 2015. The defendant on 1 February 2016 delivered two letters of demand to the plaintiff for the loss of revenue. The defendant's officer, Mr Mohd Fauzi had made statements which were defamatory in nature and/or with malicious intent to Puan Noor Azah on the fact that the plaintiff had never tampered or modified the meters. The issues were: (a) whether any tempering had been done to the electricity meter installations on the plaintiff's premises at any time in the period between the years 2013 and 2015; (b) whether the provisions of the Electrical Supply Act ('the ESA 1990') required written notice to be delivered to the plaintiff; (c) whether the disconnection of electricity supply at the plaintiff's premises was illegal; (d) whether the defendant's representative, En Mohd Fauzi had made a defamatory statement against the plaintiff; and (e) whether the defendant's officer and representative had committed trespass to the plaintiff's premises and whether the actions of the defendant amounted to an interference in tort towards the plaintiff and the plaintiff's business.

Held:

(1) The defendant adduced and led evidence on the alleged tampering for the first time when conducting its case for the defence. Nothing was specifically put forward the material facts of its case on the alleged tampering during the cross-examination of the plaintiff's witnesses. There was no challenge with respect to the testimony by the defendant's counsel during the cross-examination of the plaintiff's witnesses where they gave specific evidence as to the means by which the alleged tampering was done. It was totally unfair for the defendant to raise evidence on the same without given the opportunity to the plaintiff's witnesses to challenge, explain or contradict the same. The veracity of the defendant's evidence on the alleged tampering was not tested and there was nothing on record against which the proposed evidence by the defendant could be weighed and evaluated. The failure of the defendant to put forth those facts and cross-examine the plaintiff's witnesses amounted to an abandonment by the defendant of the part of its defence. The court was of the view that the defendant was taken to have accepted the said testimony of the plaintiff's witnesses and should not be allowed to raise evidence on the alleged tampering subsequently when conducting its case (see paras 62–67 & 71).

(2) The defendant was liable for the two wrongful disconnections of the electricity at the premises. Since the defendant had rectified the tampered meter and/or installed a new meter, the purpose to halt and prevent further losses to the defendant had already been achieved. As there was no longer any urgency, the defendant had no authority under the ESA 1990 to disconnect the electricity supply to the plaintiff's premises. The defendant was liable for the two wrongful disconnections of the electricity at the plaintiff's premises (see paras 83–86).

(3) Due to the disconnection of the electricity supply, the plaintiff had: (a) to rent and later buy a generator to ensure the unhindered operation of the ice-making business; and (b) to purchase diesel in powering the generator and its cost was twice the price of electricity supply by the defendant. Special damages totaling to RM2,907,931.40 and RM652,012.20 were incurred due to the first and second disconnections, respectively. The damages were the direct results of the non-supply of electricity and one 'which the parties knew, when they made the contract, to be likely to result from the breach of it'. As the damages came within the second limb of s 74 of the Contracts Act 1950, the plaintiff was entitled to recover from the defendant the compensation for the same (see paras 91–93).

(4) The defendant had conducted itself in ways which called for exemplary damages as follows: (a) intentionally punishing the plaintiff through disconnection of electricity supply — the lifeblood of the business; (b) intentionally prolonging the first disconnection for a maximum of three months without any acceptable basis even though, by their own admission, the maximum period was not applied to first-time disconnections; (c) refusing to meet the plaintiff's representative for possible reconciliation and showing insolence; (d) mounting a baseless claim of tampering, particularly with respect to the period of the first disconnection as the purported basis for the second disconnection and yet took no legal proceedings in pursuing the claims; and (e) effecting the second disconnection with impunity and without any regard for the pending case against the first disconnection and without waiting for judicial pronouncement on the rights of the plaintiff under the ESA 1990. The purpose of awarding the exemplary damages was to punish the defendant and to deter the defendant from misbehaving in the future. The plaintiff was awarded exemplary damages amounting to 25% of the special and general damages awarded (see paras 98–99 & 108).

(5) Encik Mohd Fauzi made statements which were defamatory in nature and/or malicious to Pn Noor Azah. In their natural and ordinary meaning, the words meant and were understood to mean the plaintiff had: (a) tampered and/or altered the meter; (b) stolen the electricity supply for the premises; (c) done something illegal; (d) had been charged and the defendant had taken court action against the plaintiff; (e) the

plaintiff had repeatedly committed the same wrongdoings; and (f) had acted unreasonably as a consumer. The impugned representation was then reduced to writing and sent to Sunshine Merchants via a letter. The representation was defamatory as it had a tendency to lower the plaintiff in the estimation of any reasonable man. The plaintiff had further proven that the words complained of had been published to a third party by the defendant (see paras 115, 122–123 & 134).

(6) The slanderous remarks were actionable per se at the plaintiff's instance and there was no necessity for the plaintiff to prove actual damage. Based on the extend of the publication of the defamatory statement, the seriousness of the defamation, the plaintiff's reputation and standing and the effect of the statement to their dignity, an award of RM25,000 each for general and aggravated damages would be fair and reasonable. The entry into the premises, by a group of about five persons, acting for the defendant in 2015 at about 2.57am, was not justifiable under the law. The defendant was only a licensee. Its employees could never be deemed as the 'authorised officers' within the meaning of s 2 of the ESA 1990. As such, the defendant could not justify itself under s 5 of the ESA 1990 which conferred the power of entry and seizure only upon authorised officers of the Energy Commission or police officers not below the rank of Inspector. Trespass was actionable per se; without necessity to prove any damage. The sum of RM50,000 as the quantum for general damages was fair and reasonable (see paras 145, 147, 171 & 177–179).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah ke atas ganti rugi yang ditanggung oleh plaintif disebabkan oleh pemotongan bekalan elektrik ke premisnya. Defendan melakukan pemeriksaan pada pemasangan meter di premis plaintif pada 4 Disember 2013 dan 6 Mei 2014. Pada 23 Jun 2014 dan 25 Jun 2014, defendan telah mengeluarkan dua notis pemotongan bekalan elektrik melalui Jadual Borang A berdasarkan kepada pemeriksaan tersebut. Pemberitahuan pemotongan bekalan tersebut menyatakan bahawa bekalan elektrik akan dipotong masing-masing pada 24 Jun 2014 dan 26 Jun 2014. Pemotongan bekalan elektrik tidak berlaku pada tarikh yang dinyatakan. Pada 1 Julai 2014, defendan mengeluarkan notis pemotongan kepada plaintif untuk Lot 140216 ('MSB 1') dan Lot 140216-1 ('MSB 2') yang merupakan premis plaintif di Jalan Berjaya 8/1, Perindustrian Taman Berjaya, 81200 Skudai Johor dan memotong bekalan elektrik ke premis plaintif ('pemotongan bekalan pertama'). Defendan hanya menyambung semula bekalan elektrik untuk kedua-dua MSB 1 dan MSB 2 pada 1 Oktober 2014. Pada 27 Julai 2014, plaintif menerima empat surat tuntutan daripada defendan yang menuntut kehilangan hasil berdasarkan dakwaan bahawa gangguan dan/atau pengubahsuaian telah dilakukan pada meter di premis plaintif. Defendan mengeluarkan notis pemotongan bertarikh 7 April 2015 untuk MSB 1 dan

MSB 2 berdasarkan kepada pemeriksaan bertarikh 15 Oktober 2014 untuk MSB 1 dan 7 Januari 2015 untuk MSB 2. Defendan memotong bekalan elektrik premis plaintif pada 8 April 2015. Pada 7 April 2015, plaintif menerima notis untuk memotong bekalan elektrik di premis plaintif dan pada 8 April 2015, defendan memotong bekalan elektrik ke premis plaintif. Defendan hanya menyambung semula bekalan elektrik untuk MSB 1 dan MSB 2 pada 14 Mei 2015. Defendan telah menyediakan dan menandatangani surat akujanji dengan Sunshine Merchants Sdn Bhd pada 21 Mei 2015 mengenai akaun plaintif dengan defendan. Pada 8 September 2015, plaintif melalui peguamnya menyerahkan surat tuntutan kepada defendan bagi memohon penjelasan mengenai tindakan defendan dan telah dibalas melalui surat bertarikh 19 Ogos 2015. Defendan pada 1 Februari 2016 menyerahkan dua surat tuntutan kepada plaintif untuk kehilangan hasil. Pegawai defendan, Encik Mohd Fauzi telah membuat pernyataan yang berunsur fitnah dan/atau dengan niat jahat kepada Puan Noor Azah mengenai kenyataan bahawa plaintif tidak pernah mengganggu atau mengubah meter. Isu-isu adalah: (a) sama ada berlaku gangguan terhadap pemasangan meter elektrik di premis plaintif pada bila-bila masa antara tahun 2013 dan 2015; (b) sama ada peruntukan Akta Bekalan Elektrik ('ABE 1990') menghendaki notis bertulis diserahkan kepada plaintif; (c) sama ada pemotongan bekalan elektrik di premis plaintif adalah tidak sah; (d) sama ada wakil defendan, En Mohd Fauzi telah membuat kenyataan fitnah terhadap plaintif;dan (f) sama ada pegawai dan wakil defendan telah melakukan pencerobohan ke premis plaintif dan sama ada tindakan defendan itu menyebabkan kacau ganggu tort kepada plaintif dan perniagaan plaintif.

Diputuskan:

(1) Defendan mengemukakan dan memberikan keterangan mengenai dakwaan gangguan pertama kali apabila menjalankan kesnya bagi pembelaan. Tidak ada yang secara khusus dikemukakan fakta-fakta material dari kesnya berdasarkan dakwaan gangguan semasa pemeriksaan balas terhadap saksi-saksi plaintif. Tidak ada bantahan berhubung dengan keterangan oleh peguamcara defendan semasa pemeriksaan balas terhadap saksi-saksi plaintif di mana mereka memberikan keterangan khusus mengenai cara-cara dengan bagaimana dakwaan gangguan tersebut dilakukan. Adalah tidak adil bagi defendan untuk mengemukakan bukti yang sama tanpa memberi peluang kepada saksi-saksi plaintif untuk mencabar, menjelaskan atau membantah dakwaan tersebut. Kebenaran keterangan oleh defendan terhadap dakwaan gangguan tersebut tidak diuji dan tidak ada rekod yang dapat mencabar bukti yang dicadangkan oleh defendan dapat ditimbang dan dinilai. Kegagalan defendan untuk mengemukakan fakta-fakta tersebut dan menyoal balas saksi-saksi plaintif terjumlah kepada pengabaian pembelaan oleh defendan. Mahkamah berpendapat bahawa defendan

dianggap telah menerima keterangan tersebut dari saksi-saksi plaintif dan tidak boleh dibenarkan untuk mengemukakan bukti mengenai dakwaan gangguan tersebut ketika menjalankan kesnya (lihat perenggan 62–67 & 71).

(2) Defendan bertanggungjawab keatas kedua-dua pemotongan elektrik secara salah di premis tersebut. Oleh kerana defendan telah memperbaiki meter yang telah diganggu dan/atau memasang meter baru, tujuan untuk menghentikan dan mencegah kerugian lebih lanjut terhadap defendan telah tercapai. Oleh kerana tidak ada kepentingan lagi, defendan tidak memiliki kuasa di bawah ABE 1990 untuk memotong bekalan elektrik di premis plaintif. Defendan bertanggungjawab keatas kedua-dua pemotongan elektrik secara salah di premis plaintif (lihat perenggan 83–86).

(3) Oleh kerana pemotongan bekalan elektrik, plaintif terpaksa: (a) menyewa dan kemudian membeli generator untuk memastikan operasi perniagaan pembuatan ais tidak terhalang; dan (b) perlu membeli diesel untuk menghidupkan generator dan harganya dua kali ganda dari harga bekalan elektrik oleh defendan. Kerugian khas berjumlah RM2,907,931.40 dan RM652,012.20 masing-masing disebabkan oleh pemotongan pertama dan kedua. Kerugian tersebut adalah akibat secara langsung dari pemotongan bekalan elektrik dan satu 'yang diketahui oleh pihak-pihak, ketika mereka membuat kontrak, kemungkinan disebabkan oleh pelanggarannya'. Oleh kerana ganti rugi tersebut terdapat pada bahagian kedua s 74 dari Akta Kontrak 1950, plaintif berhak untuk mendapatkan balik pampasan dari defendan (lihat perenggan 91–93).

(4) Defendan telah meletakkan dirinya sendiri dengan cara menuntut ganti rugi teladan seperti berikut: (a) dengan sengaja menghukum plaintif dengan memotong bekalan elektrik — nadi sesuatu perniagaan; (b) dengan sengaja melanjutkan pemotongan pertama selama maksimum tiga bulan tanpa alasan yang dapat diterima walaupun, melalui pengakuan mereka sendiri, tempoh maksimum tidak terpakai untuk pemotongan kali pertama; (c) enggan berjumpa dengan wakil plaintif untuk kemungkinan penyelesaian dan menunjukkan kebiadapan; (d) mengemukakan tuntutan gangguan yang tidak berasas, terutama berkenaan dengan tempoh pemotongan pertama sebagai kononnya asas untuk pemotongan kedua dan tidak mengambil tindakan undang-undang dalam menuntut tuntutan tersebut; dan (e)meyebabkan pemotongan kedua dengan sebagai hukuman dan tanpa mengambil kira kes yang belum selesai terhadap pemotongan pertama dan tanpa menunggu dapatan kehakiman mengenai hak-hak plaintif di bawah ABE 1990. Tujuan ganti rugi teladan adalah untuk menghukum defendan dan untuk mengelakkan defendan daripada berkelakuan tidak baik pada

masa akan datang. Plaintif dibenarkan ganti rugi teladan berjumlah 25% dari ganti rugi khas dan am yang diberikan (lihat perenggan 98–99 & 108).

(5) Encik Mohd Fauzi teah membuat kenyataan yang bersifat fitnah dan/atau berniat jahat kepada Pn Noor Azah. Dalam makna semula jadi dan biasa, kata-kata yang dimaksudkan dan difahami bermaksud plaintif telah: (a) mengganggu dan/atau mengubah meter; (b) mencuri bekalan elektrik untuk premis; (c) melakukan sesuatu yang tidak sah; (d) telah didakwa dan defendan telah mengambil tindakan mahkamah terhadap plaintif; (e) plaintif telah berulang kali melakukan kesalahan yang sama; dan (f) telah bertindak tidak wajar sebagai pengguna. Dakwaan representasi tersebut kemudiannya ditulis dan diserahkan kepada Sunshine Merchants melalui surat. Representasi tersebut adalah fitnah kerana mempunyai kecenderungan untuk merendahkan martabat plaintif kepada seseorang yang munasabah. Plaintif telah membuktikan bahawa kata-kata yang diadukan telah diterbitkan kepada pihak ketiga oleh defendan (lihat perenggan 115, 122–123 & 134).

(6) Kata kata fitnah tersebut adalah terhadap plaintif secara langsung dan tidak ada keperluan bagi plaintif untuk membuktikan kerugian nyata. Berdasarkan penyebaran penerbitan pernyataan fitnah, kewajaran fitnah, reputasi dan kedudukan plaintif dan kesan penyataan tersebut kepada maruah mereka, award sebanyak RM25,000 untuk ganti rugi am dan berat adalah wajar dan munasabah. Masuk ke dalam premis, oleh sekumpulan kira-kira lima orang, bagi pihak defendan pada tahun 2015 sekitar jam 2.57 pagi, tidak dibenarkan di bawah undang-undang. Defendan hanya pemegang lesen. Kakitangannya tidak pernah boleh dianggap sebagai 'pegawai yang diberi kuasa' di bawah s 2 ABE 1990. Oleh itu, defendan tidak dapat memberikan justifikasi di bawah s 5 ABE 1990 yang memberikan kuasa masuk dan penyitaan hanya apabila diberi kuasa pegawai Suruhanjaya Tenaga atau pegawai polis yang tidak berpangkat bawah Inspektor. Pencerobohan adalah secara langsung; tanpa perlu membuktikan kerugian. Amaun berjumlah RM50,000 sebagai ganti rugi am adalah wajar dan munasabah (lihat perenggan 145, 147, 171 & 177–179).]

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Associated Leisure Ltd and others v Associated Newspapers Ltd [1970] 2 All ER 754, CA (folld)

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ Rep 321; [1989] 1 CLJ 152, HC (refd)

Azizah bte Zainal Abidin & Ors v Dato' Bandar Kuala Lumpur [1999] 5 MLJ 405, HC (folld)

A *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352, HC (folld)
Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, third party) [2011] 4 MLJ 354, HC (refd)
Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd [2007] 1 MLJ 217; [2006]
B 4 CLJ 892, CA (refd)
Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor [2017] 6 MLJ 133; [2018] 1 CLJ 145, FC (folld)
Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors [2012] 4 MLJ 191; [2012]
C 1 LNS 1359, CA (refd)
Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd [1993] 1 MLJ 408; [1993] 2 CLJ 365, HC (refd)
International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86; [1980] 1 LNS 31, FC (refd)
D *Karun Klasik Sdn Bhd v Tenaga Nasional Bhd* [2018] 3 MLJ 749; [2018] 9 CLJ 184, CA (refd)
Kee Jee Piaou v Tenaga Nasional Berhad [2014] 1 LNS 284, HC (refd)
Knupffer v London Express Newspaper Ltd [1944] AC 116, HL (refd)
Kuddus v Chief Constable of Leicestershire Constabulary [2001] 3 All ER 193,
E HL (refd)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156; [1982] CLJ Rep 190, FC (folld)
Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise) [2009] 3 MLJ 525, HC
F (folld)
Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd [2015] 3 CLJ 825, HC (refd)
Murtadza bin Mohamed Hassan v Chong Swee Pian [1980] 1 MLJ 216, FC (folld)
G *Paramill Sdn Bhd & Anor v Datuk Joseph Pairin Kitingan* [2007] 7 MLJ 289, CA (refd)
Pardeep Kumar a/l Om Parkash Sharma v Abdullah Sani bin Hashim [2009] 2 MLJ 685, CA (refd)
Raub Australian Gold Mining Sdn Bhd v Mkini Dotcom Sdn Bhd & Ors [2018]
H 4 MLJ 209; [2018] 1 LNS 62, CA (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173; [1988] 1 CLJ Rep 233; [1988] 1 CLJ 771, SC (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and
I *another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500, CA (folld)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (refd)
Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan [2005] 1 MLJ 515, CA (folld)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56; [1973] 1 LNS 146 (refd)
Tan Kau Tiah @ Tan Ching Hai v Tetuan Teh Kim Teh, Salina & Co (a firm) & Anor [2010] 3 MLJ 569, CA (refd)
Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1993] 1 MLJ 443, HC (folld)
Tenaga Nasional Bhd v Mayaria Sdn Bhd & Anor [2019] 2 MLJ 801, CA (folld)
Thomas Thomas @ Mohan a/l K Thomas v Tenaga Nasional Bhd [2018] 5 MLJ 831; [2017] 4 CLJ 340, CA (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)
Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd [2016] 10 MLJ 788; [2016] 1 CLJ 318, HC (refd)

Legislation referred to

Civil Law Act 1956 s 11
Contracts Act 1950 s 74
Electricity Supply Act 1990 ss 2, 5, 5(1), (2), (3), 6, 37(1), (3), (14), 38, 38(1), (2), (3), (4), (5)
Licensee Supply Regulations 1990 reg 7

P Mithran (TS Yoon, Lee Jing Ni and YY Lim with him) (Kerk & Partners) for the plaintiff.
Izatunlina Jamaludin (Mohd Amierul Sharafi Shaharizam with her) (Othman Hashim & Co) for the defendant.

Ahmad Kamal J:

INTRODUCTION

[1] The plaintiff is a company incorporated and registered under the Companies Act 1965 with its registered office at Blk G-04-06, Jalan Simbang 17, Taman Perling, 81200 Johor Bahru, Johor.

[2] The defendant is a company established and registered under the Companies Act 1965 with a registered address at the Pejabat Setiausaha Syarikat, Tingkat 2, Ibu Pejabat Tenaga Nasional Bhd, No 129, Jalan Bangsar, 59200 Kuala Lumpur and is the license holder for electricity supply in Malaysia.

[3] The plaintiff was at all material times a registered user of electricity supplied and provided by the defendant under the account numbers of 03400082532201 (Meter A) and 03400082532408 (Meter B) respectively

('the meters') for Lot 140216 (MSB1) and Lot 140216-1 (MSB2) at Jalan Berjaya 8/1, Perindustrian Taman Berjaya, 81200 Skudai Johor ('the plaintiff's premises).

[4] The plaintiff's claim against the defendant is for the damages suffered by the plaintiff due to the disconnection of electricity supply to its premises.

[5] The plaintiff's claim against the defendant amongst others is for the following prayers:

(a) special damages amounting to RM2,907,931.40 arising from the first wrongful disconnection;

(b) special damages amounting to RM652,012.20 arising from the second wrongful disconnection;

(c) general damages arising from its unlawful interference with the plaintiff's trade;

(d) general damages for infringing on the plaintiff's rights as a registered electricity user by divulging the plaintiff's account details to a third party without the plaintiff's consent;

(e) general damages and aggravated damages arising from the defamation;

(f) general damages and aggravated damages arising from the trespass;

(g) an injunction to prevent the defendant and/or the defendant's officers from entering the plaintiff's premises and/or repeating the defendant's action and/or disconnecting the electricity supply and/or disrupting the plaintiff's business in any way;

(h) a declaration that the defendant subtract a sum of RM1,116,638.31 from the meter accounts;

(i) a declaration that the plaintiff had never tampered the MSB1 and MSB2;

(j) a declaration that the plaintiff does not owe the defendant the amounts incurred due to the alleged tampering found against MSB1 during the inspections on 4 December 2013, 6 May 2014, 10 May 2014, 15 October 2014 and 7 January 2015;

(k) a declaration that the defendant subtract RM151,016.15 and RM167, 467.77 from the meters accounts;

(l) a declaration that the TNB demand letter dated 1 February 2016 is null and void;

(m) exemplary damages; and

(n) costs.

BACKGROUND FACTS

[6] The defendant conducted inspections on the meter installation at the plaintiff's premises on 4 December 2013 and 6 May 2014.

[7] On 23 June 2014 and 25 June 2014, the defendant had issued two notices of disconnection of electricity supply ('the disconnection of supply notices') in Form A Schedule as a result of the inspection on 6 May 2014.

[8] The said the disconnection of supply notices stated that the supply of the electricity would be disconnected on 24 June 2014 and 26 June 2014 respectively. However, the disconnection of the supply of the electricity did not occur on that specified dates.

[9] On 1 July 2014, the defendant issued a disconnection notices dated 1 July 2014 for MSB 1 and MSB 2 to the plaintiff and disconnected the electricity supply to the plaintiff's premises ('the first disconnection of supply'). The defendant only resumed the supply of the electricity for both MSB 1 and MSB 2 on 1 October 2014

[10] On 27 July 2014, the plaintiff received four letters of demand dated 27 July 2014 ('the letters of demand') from the defendant claiming for the loss of revenue based on the allegations that the tampering and/or modifications has been made to the meters at the plaintiff's premises. The said letters of demand was signed by Mr Mohd Azfar bin Azhari on behalf of the engineers (SEAL-South Zone), seksyen Jaminan Hasil Bahagian Pembahagian, Tenaga Nasional Bhd.

[11] The details of the letters of demand are as follows:

(a) for Meter A:

(i) the defendant claimed for the loss of revenue amounting to RM6,698.17 commenced from 1 December 2013 until 4 December 2013 pursuant to s 38(3), (4) and (5) of the Electricity Supply Act 1990 ('the ESA') due to the alleged tempering found against MSB 1 during inspection on 4 December 2013; and

(ii) the defendant claimed for the loss of revenue amounting to RM365,137.79 pursuant to s 38(3), (4) and (5) of the ESA 1990 commenced from 4 December 2013 until 10 May 2014;

(b) for Meter B:

A (i) the defendant claimed for the loss of revenue amounting to RM1,603.84 commenced from 1 December 2013 until 4 December 2013 pursuant to s 38(3), (4) and (5) of the ESA 1990 due to the alleged tempering found against MSB 2 during inspection on 4 December 2013; and

B (ii) the defendant claimed for the loss of revenue amounting to RM425,091.18 commenced from 4 December 2013 until 6 May 2014 pursuant to s 38(3), (4) and (5) of the ESA 1990 due to the inspection on 6 May 2014.

C **[12]** The defendant issued a disconnection notice dated 7 April 2015 for MSB 1 and MSB 2 based on the inspection dated 15 October 2014 (MSB 1) and 7 January 2015 (MSB 2). The defendant disconnected electricity supply from the plaintiff's premises on 8 April 2015.

D **[13]** On 7 April 2015, the plaintiff received notices to disconnect electricity supply at the plaintiff's premise ('the disconnection notice dated 7 April 2015') and on 8 April 2015, the defendant disconnected the electricity supply to the plaintiff's premises. The defendant only resumed the supply of the electricity E for both MSB 1 and MSB 2 on 14 May 2015.

[14] The defendant had prepared and signed a letter of undertaking with Sunshine Merchants Sdn Bhd on 21 May 2015 regarding the plaintiff's account with the defendant.

F **[15]** On the 8 September 2015, the plaintiff through its solicitor delivered a letter of demand to the defendant to seek an explanation for the defendant's action and was responded via a letter dated 19 August 2015.

G **[16]** The defendant on 1 February 2016 delivered 2 letters of demand (letters of demand dated 1 February 2016) to the plaintiff for the loss of revenue.

H **[17]** The details of the letters of demand dated 1 February 2016 are as follows:

(a) for Meter A:

I (i) the defendant claimed for the loss of revenue amounting to RM151,016.15 commenced from 10 May 2014 until 15 October 2014 pursuant to s 38(3), (4) and (5) of the ESA 1990 due to the alleged tempering found against MSB 1 during the inspection conducted on 15 October 2014.

(b) for Meter B:

(c) the defendant claimed for the loss of revenue amounting to RM167,469.77 pursuant to s 38(3), (4) and (5) of the ESA 1990 due to the alleged tempering found against MSB 2 during the inspection conducted on 7 January 2015.

[18] The defendant delivered the disconnection notices for MSB 1 and MSB 2 on 15 February 2016 and claimed the amount as follows:

(a) MSB 1 — RM673,340.83; and

(b) MSB 2 — RM961,664.41
('the amount claimed on 15 February 2016')

THE PLAINTIFF'S CASE

[19] Ice Man Sdn Bhd ('Ice Man') carries an ice-manufacturing business on a daily basis. In October 2013, Ice Man entered into a management contract with the plaintiff whereby the plaintiff was to manage Ice Man's administration, its production operations and the electricity supply for the production.

[20] For the purpose of the management contract, the plaintiff had entered into two electricity supply contracts and had two registered electricity accounts namely MSB 1 and MSB 2 with the defendant since October 2013.

[21] On 4 December 2013, 6 May 2014, 10 May 2014, 15 October 2014 and 7 January 2015, the defendant conducted several inspections on the meters without the presence of a representative from the plaintiff.

Unlawful disconnection

[22] The defendant had disconnected electricity supply to the plaintiff's premises on 2 July 2014 ('the first disconnection') and reconnected supply on 1 October 2014.

[23] The first disconnection had caused the plaintiff to use a generator for electricity supply. This affected the operation of Ice Man's ice factory in addition to the high cost incurred to operate the generator.

[24] The plaintiff denied the defendant's allegations that the plaintiff had tampered and/or modified the meters and stated that:

(a) at all times, the plaintiff did not have any control and access to the meters as the meters that were constantly kept under lock and key with the key for access being kept by the defendant;

(b) the plaintiff is only involved in the ice business and does not have any expertise to modify or tamper with the meters; and

(c) the defendant is also uncertain as to whether the meters were damaged or had been tampered with as the defendant issued a debit letter dated 20 July 2014 to the plaintiff stating that the meters were damaged and the defendant claimed a sum of RM77, 791.51 from the plaintiff for the period between 1 May 2014 until 1 June 2014 and the letters of demand alleges the plaintiff had tampered and/or modified the meters.

[25] The plaintiff also contended that the first disconnection was unlawful as:

(a) the periods of claim were overlapping; and

(b) at the time of the first disconnection on 2 July 2014, the meters and the defendant's installations on the plaintiff's premises were in good condition.

[26] The plaintiff filed a case ('the court case') against the defendant to claim the loss in earnings caused by the first disconnection.

[27] The defendant again disconnected electricity supply to the plaintiff's premises on 8 April 2015 ('the second disconnection').

[28] The plaintiff stated that the second disconnection was unlawful as:

(a) the defendant should not have disconnected the electricity supply at the plaintiff's premise while the case involving the first disconnection was still pending in court; and

(b) the period of claim for the second disconnection included the period of time during which the electricity supply to the plaintiff's premises had been disconnected (10 May 2015 until 15 October 2014 for MSB 1 and 6 May 2014 until 7 January 2015 for MSB 2).

[29] During the period of the second disconnection, the plaintiff was introduced to Dato' Eshawar who was supposedly informed of the reasons behind the second disconnection by providing documents which stated that the plaintiff was in debt to the defendant for a sum of RM1,116,638.31 ('the disputed sum') and the amount owed by Ice Man totalling RM1,547,951.39 ('Ice Man's account arrears').

[30] To prevent continued disruption and loss without any admission of liability, the plaintiff disbursed a sum of RM1,497,289.75 for Ice Man's account arrears to Dato Eshawar on 13 May 2015. The electricity supply was reconnected on 14 May 2015.

Breach of statutory duty

[31] The defendant had acted beyond its jurisdiction, without permission and/or consent from the plaintiff as a registered user as:

(a) the defendant revealed the plaintiff's account details to a third party by conducting a discussion with Puan Noor Azah Azizan ('Azah') on 8 May 2015 which involved the following items:

(i) the settlement of the disputed sum by the plaintiff;

(ii) the settlement of the electricity bills in arrears for the plaintiff's premises;

(iii) the withdrawal of the plaintiff's the court case against the defendant;

(iv) the preparation of a company resolution by Ice Man to facilitate a change of Ice Man's management to Sunshine Merchant;

(v) the preparation of a letter of undertaking by Ice Man to sell stocks to the nominee of Sunshine Merchants; and

(vi) the backdating of documents in paras (iv) and (v) to the date of the memorandum of undertaking;

(b) on 20 May 2015, the defendant had signed the instalment payment letters with Sunshine Merchant which stated:

(i) the plaintiff agrees to settle the disputed sum and the current bills in arrears in instalments; and

(ii) that the defendant has the right to disconnect electricity supply without serving a notice of disconnection;

(c) on 21 May 2015, the defendant had signed the Sunshine Merchant letter of undertaking which was prepared by the defendant with the following terms:

(i) that Sunshine Merchant agreed that the plaintiff had tampered and/or modified the meters and had to settle the disputed sum to the defendant;

(ii) that Sunshine Merchant will settle the disputed sum to the defendant in instalments; and

(iii) that Sunshine Merchant will ensure that the plaintiff'sthe court case against the defendant will be withdrawn.

[32] The plaintiff only became aware of the instalment payment letters and the letter of undertaking after the plaintiff had met with the defendant's officer at the defendant's branch office due to receiving two copies of notices dated 22 June 2015 which claimed that two cheques for a total of RM50,000 could not be honoured.

Defamation

[33] The defendant's officer, Mr Mohd Fauzi had made statements which were defamatory in nature and/or with malicious intent to Azah on the fact that the plaintiff had never tampered and/or modified the meters.

Trespass by the defendant into the plaintiff's premises

[34] The defendant had trespassed into the plaintiff's premises on the 19 August 2015 at 2.57am by scaling the front fence of the plaintiff's premises without permission from the plaintiff's security guard.

[35] The defendant had acted with malicious intent and mala fide because:

(a) the defendant's officers had entered the plaintiff's premises without any notice;

(b) the defendant had conducted an inspection and testing of the meter installation at an unreasonable time (2.57am);

(c) the defendant's officers had forcibly entered the plaintiff's area by scaling the front fence of the factory; and

(d) the defendant's officers did not identify themselves or make clear of their intentions before entering the plaintiff's area.

[36] The defendant's actions amounted to an interference to the plaintiff's and/or Ice Man's business.

THE DEFENDANT'S CASE

[37] The defendant via his agent/servants, conducted an inspection on 4 December 2013 and 6 May 2014 of two meter installations (MSB 1 and MSB 2) according to established standard operating procedures.

[38] The defendant then issued the disconnection of supply notices (Form A) on 23 June 2014 and 25 June 2014 for both of the plaintiff's accounts. However, disconnection of the electricity supply was unable to be implemented on the dates specified.

[39] The defendant issued an additional disconnection notice dated 1 July 2014 to the plaintiff and subsequently electricity supply was disconnected from the plaintiff's premises on 2 July 2014. The statutory period of disconnection accorded by the ESA Act 1990 to the defendant is three months. Reconnection of supply occurred on 1 October 2014.

[40] The defendant proceeded to conduct an inspection on MSB 1 and MSB 2 on 15 October 2014 and 7 January 2015 respectively. The inspection revealed that both MSB 1 and MSB 2 had been tampered with. The defendant then issued a Disconnection of Supply Notice (Form A) on 7 April 2015 followed by disconnection of supply on 8 April 2015 (the second such disconnection). Reconnection of supply was done on 14 May 2015; the reduction in the period of disconnection was done at the defendant's discretion and agreement by Sunshine Merchants to make payment.

[41] The defendant received a complaint from the plaintiff that electricity was not being supplied to the plaintiff's premises on 3 July 2014 and it was discovered that the plaintiff had, without permission from the defendant, reconnected supply. A police report was filed by one Mr Mohd Azfar bin Azhari.

[42] The debit letter produced by the defendant by Puan Nazirah bt Abdul Nasir on 20 July 2014 was nullified by a letter from the same employee on 10 September 2014 due to an error in the issuance of the debit letter. This should not have been raised as an issue by the plaintiff as the plaintiff had not made any form of payment based on the claims made in the debit letter.

[43] The defendant has never received any form of payment from Dato' Eshwar. The defendant has also never instructed Dato' Eshwar to collect payment on the behalf of the defendant. Any payment listed are the concern of the plaintiff and Dato' Eshwar, not the defendant.

[44] The issue of the letter of undertaking by the defendant with Sunshine Merchants is irrelevant to the current case. The defendant has claimed the loss of revenue suffered by the plaintiff from Sunshine Merchants through separate civil suit.

[45] The defendant contended that the undertaking amount had been included in the plaintiff's monthly bill statement, which had been removed to begin claims against Sunshine Merchants.

[46] The defendant's employee, Mr Mohd Fauzi, had made a representation to Puan Azah as Puan Azah is the appointed legal representative for Dato'

Eshwar, affirming that any and all representations made by the defendant's employee are true facts relevant to the current case involving the plaintiff.

[47] The defendant contended that the inspection on 19 August 2015 which was executed by the defendant's employees at the plaintiff's premises, were conducted using search warrants numbered 003196 and 003197, which were presented by the defendant's agent/servants upon entry into the plaintiff's premises.

THE TRIAL

[48] The plaintiff had called nine witnesses and the defendant had called 20 witnesses to give evidence which are as follows:

(a) the plaintiff's witnesses:

WITNESS	NAME	WITNESS STATEMENT
PW1	AZLIN BINTI MOHD KASRAN	PWS1
PW2	LIM YONG CHIANG	PWS2
PW3	WONG THIM HOCK	PWS3
PW4	LEOW KAH POW	PWS4
PW5	NOOR AZAH AZIZAN BT MOHAMMED ALI AZIZAN	PWS5
PW6	MOHD ZUKI BIN ISMAIL	PWS6
PW7	SER BOON HWA	PWS7
PW8	GOH TACK LIK	PWS8 PWS8(A)
PW9	IBRAHIM HAIKAL BIN RAZAK	PWS9

(b) the defendant's witnesses:

WITNESS	NAME	WITNESS STATEMENT
DW1	MOHD HAFIZUL BIN SAUTI	DWS1
DW2	MOHD REDUAN BIN DAPOR	DWS2
DW3	SHARUL BIN BAHAR	DWS3
DW4	NIK MOHD AZRI AFFANDI BIN NIK MAHMOOD	DWS4
DW5	MOHAMAD SYUKRI BIN ABDUL AZIZ	DWS5
DW6	WALI MOHAMMAD GULAM SARIFF BIN MD YUSOFF	DWS6
DW7	MUHAMMAD IKHWAN BIN KHAIREL SALLEH	DWS7
DW8	MUHAMMAD YUSOFF BIN HASNAN	DWS8

DW9	MOHD ZULHELMI BIN MOHD YUSOFF	DWS9
DW10	HASBULLAH BIN SABRAN	DWS10
DW11	HIZRI HILMI BIN ABDUL SHUKOR	DWS11
DW12	MOHD FIRDAUS BIN ABDUL WADI	DWS12
DW13	MOHD RAHIMI BIN HASHIM	DWS13
DW14	WAN ZULHILMI BIN WAN MOKHTAR	DWS14
DW15	ZAHARI BIN MD ZUKI	DWS15
DW16	NAZIRAH BINTI ABDUL NASIR	DWS16
DW17	MOHAMED NASSER BIN ARIFFIN	DWS17
DW18	MOHD AZFAR BIN AZHARI	DWS18
DW19	MOHD FAUZI BIN HUSIN	DWS19
DW20	ARIZAL BIN ASHARI	DWS20

ISSUES TO BE TRIED

[49] The issues to be tried are as follows:

(a) whether any tempering had been done to the electricity meter installations on the plaintiff's premises at any time in the period between the years 2013 and 2015;

(b) whether the provisions of the ESA 1990 require a written notice to be delivered to the plaintiff;

(c) whether the disconnection of electricity supply at the plaintiff's premises was illegal;

(d) whether the defendant's representative, En Mohd Fauzi had made a defamatory statement against the plaintiff;

(e) whether the defendant's officer and/or representative had committed trespass to the plaintiff's premises on 19 August 2015 at 2.57am; and

(f) whether the actions of the defendant amount to an interference in tort towards the plaintiff and the plaintiff's business.

THE LAW

[50] The ESA 1990 had given a right and power to the defendant to disconnect electricity supply to halt when the defendant found the meter installation was tampered with.

[51] Section 38(1) of the ESA 1990 states as follows:

38(1) Where any person employed by a licensee finds upon any premises evidence which gives reasonable grounds for him to believe that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorized by the licensee shall within three working days from the date of such finding inform the Commission in writing, and the licensee may, upon giving not less than forty eight hours' notice from the same date in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

[52] Further, s 37(1), (3) and (14) of the ESA 1990 provides as follows:

37(1) Any person who tampers with or adjusts any installation or part thereof or manufactures or imports or sells any equipment so as to cause or to be likely to cause danger to human life or limb or injury to any equipment or other property commits an offence and for each such offence shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding ten years or to both.

37(3) Any person who in any manner dishonestly —

(a) abstracts electricity;

(b) consumes electricity;

(c) uses electricity;

(d) alters the index of any meter or other instrument used on or in connection with any installation of any supply authority or any licensed installation for recording the output or consumption of electricity; or

(e) prevents any such meter or instrument from duly recording the output or consumption of electricity.

Commits on offence ...

37(14) Any person who damages or removes any meter or other instrument used on or in connection with any licensed installation, for recording the output or consumption of electricity commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

[53] The purpose and the objectives of s 38(1) of the ESA 1990 have been explained by the courts in the following cases:

(a) in *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892 at para [8], the Court of Appeal held that 's 38(1) Akta tersebut telah diperuntukkan secara spesifik untuk menjaga kepentingan TNB dan membolehkan TNB bertindak cepat dan dengan itu dapat mencegah penyalahgunaan seperti pencurian bekalan elektrik yang dibekalkan oleh TNB'; and

(b) in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478 the Federal Court affirmed the Court of Appeal's finding in the *Claybricks & Tiles* case on s 38(1) of the ESA 1990 that it

is to address situations 'where electricity supply needs to be severed immediately it is to avoid further illegal usage by the perpetrator', 'to give effective powers to TNB to instantly prevent any offence that may be committed and not to be left unattended or unabated' and to provide specifically 'for the preservation of TNB's interest and empowers TNB to act expeditiously, thereby preventing misuse such as theft of electricity supplied by TNB'.

FINDINGS OF THIS COURT

[54] Having fully and carefully considered the plaintiff's as well as the defendant's case and the issues raised in the written submissions, I decided to allow the plaintiff's claim at paras 111(a), (b), (d), (e), (f), (i), (j), (l) and (m) of the amended statement of claim with costs of RM40,000 subject to payment of the allocator fees. The reasons for the decision are set down as below.

Whether any tampering had been done to the electricity meter installations on the plaintiff's premises at any time in the period between the year 2013 and 2015

[55] It is the defendant's case that upon inspections on 4 December 2013, 6 May 2014, 15 October 2014 and 7 January 2015 on the meter installations at MSB 1 and MSB 2 respectively at the plaintiff's premises, the defendant's witnesses through DW1 to DW14 found that the meter installation was tampered with.

[56] The defendant submitted that it is not the duty of the defendant to prove who had tampered with the meter installations.

[57] The defendant further submitted that there was no provision under s 38(1) of the ESA 1990 that the defendant must first prove that it was registered consumer ie plaintiff who had tampered with the meter installation. To support its contention the defendant had relied on the decision of *Thomas Thomas @ Mohan a/l K Thomas v Tenaga Nasional Bhd* [2018] 5 MLJ 831; [2017] 4 CLJ 340.

[58] The plaintiff on the other hand raised a preliminary objection ('PO') against the defendant for raising evidence on the alleged tampering on the ground that the defendant did not put forth to the plaintiff's relevant witnesses the pictures and evidence purportedly showing the alleged tampering or what the defendant's witnesses saw during the inspection and cross examine the plaintiff's witnesses the same.

A **[59]** The plaintiff further submitted that none of the crucial and specific facts of defendant's case on the alleged tampering were put to the plaintiff's witnesses during cross-examination.

B **[60]** However, upon hearing the PO from the learned counsel for the plaintiff, I have directed the parties to address me on this issue in the parties' written submission.

C **[61]** After perusing the parties' written submissions and the notes of proceeding, I agree with the PO taken by the plaintiff.

D **[62]** I find that the defendant adduced and led evidence on the alleged tampering for the first time when conducting its case for the defence. Nothing was specifically put forward the material facts of its case on the alleged tampering during the cross-examination of the plaintiff's witnesses.

E **[63]** The relevant witnesses for the plaintiff had in their witness statements stated that they did not have access to the electrical installations and also denied claims or knowledge about the alleged tampering.

F **[64]** I find that there was no challenge with respect to the testimony by defendant's counsel during the cross-examination of the plaintiff's witnesses by way of specifically putting to these witnesses the evidence of DW3, DW8, DW12, and DW14 where they gave specific evidence as to the means by which the alleged tampering was done.

G **[65]** It is my view that it is totally unfair for the defendant to raise evidence on the same without given the opportunity to the plaintiff's witnesses to challenge, explain or contradict the same.

H **[66]** Further, I am of the opinion the veracity of the defendant's evidence on the alleged tampering was not tested and there was nothing on record against which the proposed evidence by the defendant could be weighed and evaluated by this court.

[67] Therefore, I am of the considered view that the failure of the defendant's to put forth those facts and cross-examine the plaintiff's witnesses amounts to an abandonment by the defendant of this part of its defence.

I **[68]** In *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 at p 400, the Court of Appeal held as follows:

> The main thrust of the defendant's case was that the plaintiff had requested the first respondent's permission to climb the tree which the first respondent refused. The

plaintiff's case, on the other hand, was that he had been instructed by the first defendant to make the climb. But nowhere in the defence was it alleged that there was such a request as alleged in the evidence. Further and more importantly, it was never put to the plaintiff under cross-examination that such a request had come from him. The trial judge ought to have taken this failure into account when he came to assess the evidence. But nowhere in his judgement is there any indication that he did so. In *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors* and another appeal [1995] 2 MLJ 770 at p 794, this court when applying the rule in *Browne & Dun*n (1893) 6 R 67 said:

> *It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.* (Emphasis added.)

[69] Further in *Paramill Sdn Bhd & Anor v Datuk Joseph Pairin Kitingan* [2007] 7 MLJ 289 the Court of Appeal held:

> [42] Cross-examination of witnesses is classified as one of the fundamental rules of procedural fairness. In *Aik Ming (M) Sdn Bhd v Chang Ching Chuen* [1995] 2 MLJ 770, p 795 (CA) it is stated thus:
>
> > *It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case* and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal cases. It applies with equal force in the trial of civil cases. As PW1's and PW2's testimonies regarding the above-mentioned matters were not challenged by cross-examination they must be taken to have been accepted by the respondent. In which event the findings of the learned judge on point is plainly wrong being contrary to the accepted evidence of independent witnesses as PW1 and PW2 had no interest in the dispute. (Emphasis added.)

[70] The Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 795 held:

> The rule in Browne v Dunn has been applied by Indian courts in the context of the Indian Evidence Act 1872, on which is based our Evidence Act 1950. I need only refer to the decision in *Carapiet v Derderian* AIR 1961 Cal 359, where Mukharji J, at p 362 of the report, expressed the principle in the following words:
>
> > *The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all.* It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice because it gives notice to the other side of the actual case that is going to be made

when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. *It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the Plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.* (Emphasis added.)

[71] Therefore, based on the principles of law laid down by the above authorities, I am of the view that the defendant was taken to have accepted the said testimony of the plaintiff's witnesses and should not be allowed to raise evidence on the alleged tampering subsequently when conducting its case.

Whether the disconnection of electricity supply at the plaintiff's premises was illegal

[72] It was not disputed by both parties that the disconnection of supply were done at the plaintiff's premises, MSB 1 and MSB 2 respectively on 2 July 2014 and 8 April 2015. The above facts was testified by DW20.

[73] The defendant submitted that the disconnections of supply at the plaintiff's premises were legal and in accordance with s 38 of the ESA 1990.

[74] The defendant relied on the decision of *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478 and *Karun Klasik Sdn Bhd v Tenaga Nasional Bhd* [2018] 3 MLJ 749; [2018] 9 CLJ 184 to support its contention.

[75] Based on the above authorities the defendant submitted that the defendant does not loses the right to disconnect the electricity supply even if the tampering has been rectified and is no longer exist. The disconnection of electricity supply gives the defendant the statutory right to do so upon discovery of tampering on the meter installation pursuant to s 38 of the ESA 1990.

[76] The defendant further submitted that there was no unlawful use of statutory power in disconnecting the electricity supply at the plaintiff's premises based on the grounds laid down by the Court of Appeal in the above authorities nor was there any form of punishment to extract the payment for the loss of revenue against the plaintiff.

[77] According to the defendant pursuant to s 38(2) of the ESA 1990, the defendant has the statutory right to disconnect the electricity supply at the plaintiff's premises for a period which shall not exceed three months. In the instant case, the disconnection of electricity supply does not exceed three months period as provided by the Act.

[78] The plaintiff on the other hand had submitted that the alleged tampering had been rectified and was no longer extant and as such the first disconnection (2 July 2014–1 October 2014) and the second disconnection (8 April 2015–14 May 2015) were unnecessary, deliberately calculated to be punitive and used as a means to obtain payment from the plaintiff.

[79] It is also the submission of the plaintiff that the defendant cannot exercise s 38(1) of the ESA 1990 if the alleged tampering was halted and no longer extant and to recover the loss of revenue.

[80] To support its contention, the plaintiff relied on the Court of Appeal decision in *Tenaga Nasional Bhd v Mayaria Sdn Bhd & Anor* [2019] 2 MLJ 801; *WRP Asia Pacific Sdn Bhd*; *Modernria Plastic Industries (M) Sdn Bhd v Tenaga Nasional Bhd* [2015] 3 CLJ 825; *Xin Guan Premier Sdn Bhd v Tenaga Nasional Bhd* [2016] 10 MLJ 788; [2016] 1 CLJ 318.

[81] There were two conflicting decisions by the Court of Appeal concerning the law on disconnection of electricity supply ie the decision in *Karun Klasik* and the *Mayaria* as of the date of the trial.

[82] However before the decision in this case was delivered on 30 September 2019, both counsel for the plaintiff and the defendant had informed this court that the Federal Court on 4 September 2019 had delivered its decision in *Mayaria.*

[83] This court was informed that the Federal Court had dismissed the appeal by TNB and affirmed the decision of Court of Appeal in *Mayaria* whereby the Federal Court had agreed with the Court of Appeal's interpretation of s 38(1) and (3) of the ESA 1990 that once the meter has been rectified, TNB is not empowered to disconnect the supply as the purpose of the disconnection is to prevent future loss of revenue to TNB.

[84] By virtue of the Federal Court decision in *Mayaria* and based on the doctrine of binding precedent, the lower courts ought to follow the ratio decidendi of higher courts. Therefore, I am bound with the Federal Court decision in *Mayaria*.

[85] Based on the above reasons, I find that since the defendant has rectified the tampered meter and/or installed a new meter, the purpose ie to halt and prevent further losses to the defendant had already been achieved. As there was no longer any urgency, the defendant had no authority under the ESA 1990 to disconnect the electricity supply to the plaintiff's premises.

[86] Therefore, I hold the defendant is liable for the two wrongful disconnections of the electricity at the plaintiff's premises.

Damages

[87] Based on this court's finding that the disconnection of electricity supply at the plaintiff's premises on 2 July 2014 and 8 April 2015 was illegal, the defendant had breached the electricity supply contract twice towards the plaintiff and was therefore liable.

[88] The next issue to be determined is whether the damages and/or losses suffered by the plaintiff were within the contemplation of the defendant.

[89] Section 74 of the Contracts Act 1950 states as follows:

> 74 Compensation for loss or damage caused by breach of contract
>
> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by the reason of the breach.

[90] In gist, s 74 states that the party may recover any loss or damage for any breach under two of its limbs as follows:

(a) damages or losses which naturally arose in the usual course of things; or

(b) damages or losses which the parties knew, when they made the contract, to be likely to result from the breach of it.

[91] Due to the disconnection of the electricity supply, the plaintiff had to rent and later buy a generator to ensure the unhindered operation of the ice-making business (PW2 p 18). The plaintiff also had to purchase diesel in powering the generator and its cost was twice the price of electricity supply by defendant (PW8 p 187).

[92] During the trial, relevant documents had been tendered by the plaintiff's witnesses through PW2, PW7 and PW8 and I find that the plaintiff's evidence in this respect was not discredited and therefore I accepted the evidence given by the witnesses as follows:

(a) special damages totalling *RM2,907,931.40* incurred due to first disconnection with the breakdown as follows:

(i) *RM734,066.40* being the cost of purchasing 289,235 liter of diesel (exhs P8–P18);

(ii) *RM313,640* being the cost of renting one generator set with 1,000KVA and another generator set with 15,00KVA from 2 July 2014 until 1 October 2014 (exhs P1 and P3);

(iii) *RM324,000* being the cost of purchasing the generator set with 1500KVA (exhs P1 and P3); and

(iv) *RM1,536,225* being the payment for damages to Ice Man (exh P19).

(b) special damages totalling *RM652,012.20* incurred due to second disconnection with the breakdown as follows:

(i) *RM450,729.60* being the cost of purchasing 184,200 liter of diesel (exhs P20–P22);

(ii) *RM200,000* being the cost of renting one generator set with 1,500KVA from 8 April 2015 until 15 May 2015 (exh P2); and

(iii) *RM1,282.60* being the cost of maintaining the generator set (exh P23).

[93] I find that the special damages as particularized above were the direct results of the non-supply of electricity by the defendant and ones 'which the parties knew, when they made the contact, to be likely to result from the breach of it'. I am of the view, as the damages come within the second limb of s 74 of the Contracts Act 1950, the plaintiff is therefore entitled to recover from the defendant compensation for the same.

[94] The defendant however had argued that PW2 (the director of vendor company in machinery business) could not adduce the proof of inquiry, quotation, written notes, receipts and statement of account in proving that the transaction related to the generator set took place.

[95] The defendant then asserted that there was no documentary evidence from the plaintiff and thereby discrediting the plaintiff's case that expenses were incurred in renting and purchasing the generator set following the said disconnections by the defendant.

[96] However, I find that the documentary evidence which was produced before this court ie the invoices issued and the payment vouchers signed by the vendor company, being the conclusive proof of the transaction. This evidence was all marked as exhibits (exhs P1(A)–(H), P2(A)–(B) and P3(A)–(H)) and not challenged by the defendant and I see no reason why I should reject those documents.

Exemplary damages

[97] From the evidence presented before this court, I find that as the result of the defendant's unlawful conduct, and exercise of its statutory powers and its serious transgressions and corporate malfeasance, the plaintiff as consumer has been made to sustain and suffer grave losses and damages.

[98] From the evidence produced in court, this court finds that the defendant had conducted itself in ways which call for exemplary damages as follows:

(a) intentionally punishing the plaintiff through disconnection of electricity supply — the lifeblood of business;

(b) intentionally prolonging the first disconnection for a maximum of three months without any acceptable basis even though by their own admission the maximum period is not applied to first time disconnections;

(c) refusing to meet the plaintiff's representative for possible reconciliation and showing insolence;

(d) mounting a baseless claim of tampering, particularly with respect to the period of first disconnection as the purported basis for the second disconnection and yet took no legal proceedings in pursuing the claims; and

(e) effecting the second disconnection with impunity and without any regard for the pending case against the first disconnection (Suit 113) and without waiting for judicial pronouncement on the rights of the plaintiff under the ESA 1990

[99] The purpose of this court in awarding exemplary damages is to punish the defendant, to deter the defendant from misbehaving in the future.

[100] The House of Lords in *Rookes v Barnard* [1964] AC 1129 sets out three categories in which exemplary damages may be awarded:

(a) the first category is oppressive, arbitrary or unconstitutional action by the servants of the government; and

(b) second category are those in which that defendant conducts has been calculated by him to make profit for himself which may well exceed the compensation payable to the plaintiff; and

(c) expressly authorised by statute.

[101] Even though, I find that the first category contemplated by *Rookes v Barnard* was only confined to government servants, but I noticed there has been practice of the Malaysian courts in awarding exemplary damages against companies in the private section. This can be seen in the following cases:

(a) *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors* [2012] 4 MLJ 191; [2012] 1 LNS 1359;

(b) *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, third party)* [2011] 4 MLJ 354;

(c) *Tan Kau Tiah @ Tan Ching Hai v Tetuan Teh Kim Teh, Salina & Co (a firm) & Anor* [2010] 3 MLJ 569;

(d) *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; and

(e) *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443.

[102] Further in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 3 All ER 193 at p 210, the House of Lords had stated as follows:

> [63] The arguments for and against exemplary damages need no rehearsing. They are familiar enough, and they are set out clearly in the Law Commission's report. In the end and in respectful agreement with the views expressed by Lord Willberforce in *Cassell & Co Ltd v Broome*, the feature which I find most striking is the extent to which the principle of exemplary damages continues to have vitality. The availability of exemplary damages has played a significant role in buttressing civil liberties, in claims for false imprisonment and wrongful arrest. From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the Defendant's conduct calls for a further response from the courts. On occasion *conscious wrongdoing by a Defendant is outrageous, his disregard of the claimant's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour.* Without an award of exemplary damages, justice will not have been done. Exemplary damages, as a remedy of last resort, fill what otherwise would be a regrettable lacuna. (Emphasis added.)

[103] Based on the above, the House of Lords had restated that exemplary damages may be exceptionally awarded as a mark of disapproval of 'conscious

wrongdoing by a defendant is so outrageous, his disregard of the claimant's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour.'

[104] In *Rookes v Barnard,* the House of Lords had set out three considerations to be taken into account while awarding exemplary damages as follows:

(a) the plaintiff is the victim of punishable behaviour;

(b) moderation in the award; and

(c) the means of the tortfeasor.

[105] I find in the instant case DW20 had admitted in his testimony that the defendant had disconnected the electricity supply to punish the plaintiff and thereby rendering the plaintiff as the victim of punishable behaviour.

[106] The damages awarded should not be greater than the punishment in the criminal sphere. No comparison can be drawn in this case as there was no criminal provision against the unlawful disconnection of electricity supply in the ESA 1990.

[107] The last consideration this court must take into account is the wealth of the defendant. The greater the financial standing of the defendant, the greater the exemplary awards.

[108] Based on the above, I award the plaintiff exemplary damages amounting to 25% of the special damages awarded under para 111(a) and (b) of the amended statement of claim and general damages awarded under para 111(d) of the amended statement of claim.

[109] My finding is based on the authorities below in which the courts awarded 25% of compensatory damages as quantum for exemplary damages:

(a) *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500;

(b) *Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515;

(c) *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors*; and

(d) *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor*.

[110] I also awarded the plaintiff pre-judgement interest under s 11 of the Civil Law Act 1956.

[111] The rationale that pre-judgement interest is awarded to compensate the plaintiff for being deprived of the use of money to which he is entitled on the date of accrual of the cause of action.

[112] In this regards, I find support by the Federal Court case of *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156; [1982] CLJ Rep 190 and *Murtadza bin Mohamed Hassan v Chong Swee Pian* [1980] 1 MLJ 216.

[113] Based on the above, I awarded the plaintiff an interest of 3%pa of the special damages from the date of respective disconnection until the date of judgement.

Whether the defendant's representative, En Mohd Fauzi had made a defamatory statement against the plaintiff

[114] On 8 May 2015, the impugned representation was made by En Mohd Fauzi bin Husin (DW19), defendant's representative to Pn Noor Azah Azizan (PW5) through a phone call which is as follows:

> Untuk makluman Yg Bhg Dato', Pejabat Timbalan Presiden (TNB Distribution Division) melalui Encik Mohd Fauzi telah menegaskan kepada pihak kami bahawa melalui siasatan TNB, kesalahan pihak syarikat pemilik premis yang dinamakan di atas, merupakan satu kesalahan yang berat kerana mereka telah berkali-kali melakukan kesalahan (repeated offence) mengubahsuai meter-meter TNB dan mencuri bekalan elektrik di premis tersebut di atas. Menurut Seksyen 37 Akta Bekalan Elektrik 1990, kesalahan ini jika disabitkan, boleh dikenakan denda tidak melebihi RM100,000.00 atau penjara selama tempoh tidak melebihi 3 tahun atau kedua-duanya. Menurut Seksyen 38 Akta yang sama, kesalahan yang telah dilakukan seperti di atas boleh membenarkan pihak TNB mengambil tindakan pemotongan bekalan elektrik dengan serta merta dengan memberi notis tidak kurang daripada 24 jam. Pemasangan semula TIDAK akan dilakukan sehingga amaun tuntutan pihak TNB di Mahkamah dibayar oleh pesalah, dan ini juga tertakluk kepada budi bicara pihak TNB dengan syarat tempoh pemotongan adalah tidak melebihi 3 bulan.

[115] The impugned representation was subsequently reduced to writing and sent by PW5 to Sunshine Merchants via a letter dated 8 May 2015 (exh P5).

[116] The making of the impugned representation through the phone call was admitted by the defendant in paras 39 and 45 of its statement of defence and was therefore not disputed.

[117] The issue before the court is whether the plaintiff has established the cause of action of defamation.

APPLICABLE LAW ON DEFAMATION

[118] The act of defamation is committed when the defendant publishes to a third person words or matters containing untrue imputation against the reputation of the plaintiff. Liability for defamation is divided into two categories, that of libel and slander. If the publication is made in a permanent form or is broadcast or is part of a theatrical performance, it is libel; if it is in some transient form or is conveyed by spoken words or gestures, it is slander (see *Gatley on Libel and Slander* (9th Ed) at p 6).

[119] In *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ Rep 321; [1989] 1 CLJ 152, Mohamed Dzaiddin J (as he then was) clearly laid down the necessary procedure in establishing a claim for libel when he said (at p 316):

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the Plaintiff to show *(1) the words are defamatory; (2) the words refer to the Plaintiff; and (3) the words were published*.

[120] In other words, the plaintiff must prove three elements of the tort of defamation, which are:

(a) the plaintiff must show that the statement bears the defamatory imputations;

(b) the statement must refer to or reflect upon the plaintiff's reputation; and

(c) the statement must have been published to a third person by the defendant.

Defamatory imputations

What is defamatory imputation?

[121] There is no precise test to be applied to determine whether or not any given words are defamatory. His Lordship Mohamed Azmi J (as he then was) in the case of *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56; [1973] 1 LNS 146 at p 58, quoting *Gatley on Libel and Slander* (6th Ed) at p 4 stated the following:

> There is no wholly satisfactory definition of defamatory imputation. Any imputation which may tend to lower the Plaintiff in the estimation of right-thinking members of society generally, to cut him off from society or 'to expose him to hatred, contempt or ridicule', is defamatory of him. An imputation may be defamatory whether or not it is believed by those to whom it is published.

It was further quoted that (at p 58):

> A defamatory imputation is one to a man's discredit or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession or to injure his financial credit. The standard of opinion is that of right thinking persons generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only to its tendency.

[122] In our present case, I find that the defendant's officer, Encik Mohd Fauzi (DW19) had made statements which were defamatory in nature and/or with malicious intent to Pn Azah (PW5) on the fact that the plaintiff had never tampered and/or modified the meters. In their natural and ordinary meaning, the words meant and were understood to mean the followings:

(a) the plaintiff had tampered and/or altered the meter;

(b) the plaintiff had stolen electricity supply for the premises;

(c) the plaintiff had done something illegal;

(d) the plaintiff had been charged and the defendant has taken court action against the plaintiff;

(e) the plaintiff had repeatedly committed the same wrongdoings; and

(f) the plaintiff as a consumer had acted unreasonably.

[123] In my view, the representation is defamatory as it has a tendency to lower the plaintiff in the estimation of any reasonable man.

Reference to the plaintiff's reputation

[124] If the plaintiff has shown that the words bear some sort of defamatory imputation, he must then proceed to establish the defamatory words or remarks in question were published of and concerning him. The statement must be capable of referring to the plaintiffs or of identifying him. On this point, the Privy Council in the case of *Knupffer v London Express Newspaper Ltd* [1944] AC 116, had this to say:

> It is an essential element of the cause of action for defamation that the words complained of should be published of the Plaintiff. Where he is not named the test of this is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to. The question whether they did so in fact does not arise if they cannot in law be regarded as capable of referring to him.

[125] In the case of *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408; [1993] 2 CLJ 365, His Lordship Lim Beng Choon J (as he then was) has held:

A It is an essential element of the cause of action for defamation that the words complained of should be published of the Plaintiff. The test which the plaintiff has to furnish an answer to satisfy the court is whether the words would reasonably in the circumstances lead person acquainted with the plaintiff to believe that he was the person referred to

B

[126] In our present case, it is not disputed by the defendant that the statement clearly refers to the plaintiff but the defendant denied that the impugned words were uttered by DW19. The defendant submitted that PW5 admitted that she had written the words on her own as stated in her letter.

C

[127] However upon perusal of the statement of defence I find that the defendant had not disputed that the impugned words were made by the relevant employee of the defendant ie DW19. This can be clearly seen from defendant's unconditional admission at paras 39 and 45 of its statement of D defence as follows:

Paragraph 39

Perenggan 56 & 57 mengenai Representasi pekerja Defendan, En. Mohd Fauzi yang mana diakui oleh Defendan kecuali sepertimana yang dinafikan secara khusus. E Defendan menyatakan bahawa a) telah mengusik dan/atau mengubahsuai Meter-Meter tersebut. Defendan mengatakan bahawa pepasangan meter di premis Plaintiff didapati telah diusik pada setiap kali pemeriksaan dilakukan oleh Defendan pada 4.12.2013, 6.5 2014, 15.10.2014 dan juga pada 7.1.2015 di premis Plaintiff.

F Paragraph 45

Perenggan 58 pernyataan tuntutan adalah dirujuk dan Defendan menyatakan bahawa segala representasi yang dilakukan oleh pekerja Defendan merupakan fakta-fakta benar mengenai kes ini yang melibatkan Plaintiff. Pernyataan Plaintiff hanyalah satu cubaan untuk merendahkan (undermine) Defendan yang mana jelas gagal. G (Emphasis added.)

[128] Based on the above, I am of the view that the defendant is bound by their pleadings and is not allowed to adduce facts and issues which they have not pleaded (see *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ H 1; [2015] 8 CLJ 944).

[129] Further the Court of Appeal in *Raub Australian Gold Mining Sdn Bhd v Mkini Dotcom Sdn Bhd & Ors* [2018] 4 MLJ 209; [2018] 1 LNS 62 held as I follows:

[66] The fact that it is not within the contemplation of the parties is unfair and prejudicial to the party against whom such a defence is levelled. This is the underlying reason why parties are bound to their pleaded case:

[67] In the case of *RHB Bank Bhd v Kwan Chew Holdings* [2010] 2 MLJ

188; [2010] 1 CLJ 665, the Federal Court similarly criticized the Court of Appeal for dealing with the appeal on an unpleaded issue, finding that the proposition of the Court of Appeal was not even pleaded by the respondent and the parties must abide by their pleadings and it is not the duty of the Court to invent or create a cause of action or a defence under the guise of doing justice for the parties.

[130] Hence it is my considered view that the defendant is not entitled to depart from its pleaded case and I hold that the impugned words was made by DW19 and refers to plaintiff's reputation.

Publication to a third person

[131] The final element that the plaintiff must prove is that the words of which he complains have been published to any third party by the defendant.

[132] Publication means making a defamatory matter known to some person other than of whom It is written or spoken (see *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173; [1988] 1 CLJ Rep 233; [1988] 1 CLJ 771 and *Gatley on Libel and Slander* (9th Ed) at p 134).

[133] As has been pointed out earlier, the defendant had unequivocally admitted the publication of the impugned words as stated in paras 39 and 45 of its statement of defence.

[134] Therefore, it is clear from the above that the final element that the plaintiff must prove that the words of the which the plaintiff's complain have been published to the third party by the defendant has been successfully proven by the plaintiff.

[135] Thus, it is my considered view that the plaintiff has established all the necessary elements of defamation against the defendant.

Justification

[136] The defendant further argues that the impugned words/representations made against the plaintiff was true in substance and in fact. The defendant's defence was therefore one of justification (see para 45 of its statement of defence).

[137] The defendant further submitted that the impugned words is not defamatory in nature as there are justifications that the tampering was discovered at the plaintiff's meter installation on each and every inspection.

[138] Based on the pleadings, there were four inspections carried out on the meter installation at the plaintiff's premises and the tampering was found on all four inspections.

[139] Since the defendant had raised the defence of justification in that defamatory statements were true, then the defendant bare the burden of proving his defence on a balance of probabilities (see *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86; [1980] 1 LNS 31).

[140] When the evidence is evaluated wholly and upon examination and evaluation of the plaintiff's and defendant's evidence I find that that the defendant had failed to prove its defence of justification for the following reasons:

(a) the defendant did not put forward its case on the alleged tampering through the plaintiff's witnesses and has been mentioned in paras 58–71 above. This court finds that the defendant therefore had abandoned these allegations;

(b) based on the above, the defendant's plea of justifications fails and therefore liable for defamation;

(c) even if this court were to accept the defence of justification by the defendant, it only amounts to the fact that the defendant's employees found the alleged tampering was committed at the plaintiff's premises and not that the defendant's employees found that the plaintiff committed the alleged tampering. This has been clearly admitted by DW19 is his evidence as follows:

(see notes of evidence at page 781 line 7)

S: Seterusnya, saya rujuk saksi kepada 672-74, bundle A2. Ini surat daripada Azah. Peguam ada cadangkan kepada En. Fauzi berdasarkan kepada surat - surat ini, setuju atau tidak, apa yang dikatakan di dalam surat ini diberitahu oleh kamu. En. Fauzi kata bukan semuanya. Jadi boleh jelaskan apa yang dimaksudkan dengan bukan semuanya?

J: Dalam surat ini, saya lebih suka merujuk kepada perenggan terakhir untuk makluman yang berbahagia Dato' lah, sebab itu dia quote nama saya tu. Dia sebenarnya, saya hanya bersetuju 100% bermula dari perenggan menurut Seksyen 37. Yang sebelum tu saya tak bersetuju dengan kandungan ayat tersebut kerana kebiasaannya satu rundingan atau penyelesaian diadakan dengan pengguna, *saya akan cerita kes ini merupakan kes usikan pepasangan meter. Saya takkan menuduh sesiapa. Sebab dalam TNB apabila mengambil tindakan sivil, kita tak tahu siapa yang buat. That's why saya takkan sesekali berani menuduh yang kamu yang membuat usikan.* Memang takde benda tu keluar dari mulut saya. So, biasa yang saya akan explain, saya punya SOP memang standard lah, saya akan explain ada pemeriksaan dilakukan pada sekian haribulan, dan kami dapati di pepasangan meter premis Big Man telah

diganggu. Kalau ikut bawah seksyen 37 itu dengan curanglah. Ayat yang digunakan oleh akta. Jadi berdasarkan tersebut, meter merekodkan penggunaan yang kurang daripada yang sepatutnya. Dan lepas itu, TNB akan menuntut jumlah kerugian yang TNB alami dan saya quote pulak pasal pemotongan apa semua, jadi saya bagitaulah bawah seksyen 38 yang itu betullah. Yang atas itu tak betul. Cuma seksyen 37 ke bawah memang saya ada terangkan in detail tapi yang atas tu dia quote tak betullah. (Emphasis added.)

(d) it is to be noted that until the date of the trial, the defendant did not pursue any claim of the alleged tampering against the plaintiff. If what was alleged by the defendant is true, surely the defendant will have pursued claims for the alleged losses by way of counterclaim or fresh suit.

[141] Based on the above reasons, this court finds that the defendant had failed to prove the defence of justification and I am satisfied that the impugned words had caused injury and losses to the plaintiff and as such are entitled to be compensated by the defendant.

DAMAGES

[142] The Federal Court in *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor* [2017] 6 MLJ 133; [2018] 1 CLJ 145 held as follows:

(76) The tort of defamation exists to protect, not the person or the pocket, but reputation of the person defamed (see Jameel per *Baroness Hale* [2006] 4 All ER 1279 at 1322]. In *Chin Choon v Chua Jui Meng* [2005] 2 CLJ 559, the Court of Appeal said at p 573:

In Defamation Law, procedure & practice by Price & Duodu (3rd Ed) para 20-04 at p 208) the learned authors set out the several factors that a court must take into account in assessing compensatory damages. This is what they say:

The amount of damages awarded in respect of vindication and injury to reputation and feelings depends on a number of factors:

1. The gravity of the allegation;
2. The size and influence of the circulation;
3. The effect of the publication;
4. The extent and nature of the claimant's reputation;
5. The behaviour of the Defendant;
6. The behaviour of the claimant;

This list is most helpful. But it must be borne in mind that this is not by any means exhaustive of the matters which the court may take into account when making an assessment.

[143] In the instant case, I find that the impugned representation imputes that the plaintiff repeatedly committed a crime under s 37(1), (3) or (14) of the ESA 1990 which attracts imprisonment.

[144] Reasonable persons who chance upon the impugned representations are likely to avoid dealing with the plaintiff deemed as 'criminal'.

[145] To me, the slanderous remark were therefore actionable per se at the plaintiff's instance and there is no necessity for the plaintiff to prove actual damage.

(See *Pardeep Kumar a/l Om Parkash Sharma v Abdullah Sani bin Hashim* [2009] 2 MLJ 685.)

[146] Further in *Associated Leisure Ltd and others v Associated Newspapers Ltd* [1970] 2 All ER 754 at p 757, Lord Denning MR had stated as follows:

> I am sure Devlin J did not wish in any way to detract from the rule, well settled, which I will read from Gatley:
>
> > A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence of the truth of the imputation, for failure to establish this defence at the trial may properly be taken in aggravation of damages.
>
> I have always understood such to be the duty of counsel. Like a charge of fraud he must not put a plea of justification on the record unless he has clear and sufficient evidence to support it.

[147] Based on the authorities cited above, and the extend of the publication of the defamatory statement, the seriousness of the defamation, plaintiff's reputation and standing and the effect of the statement to their dignity. I am of the view, an award of RM25,000 for general damages and RM25,000 for aggravated damage to the plaintiff would be fair and reasonable.

Whether the defendant had infringed the plaintiff's rights as a registered electricity user by divulging the plaintiff's account details to a third party without the plaintiff's consent

[148] This court also finds that based on the evidence of PW5 in the midst of the second disconnection, One Sunshine Merchants Sdn Bhd entered into a memorandum of understanding (MOU) dated 10 April 2015 with Ice Man with the intention to take over Ice Man.

(see PWS5 — QA:10; notes of evidence at pp 64 and 119)

[149] According to PW5 and DW18, various discussions and phone calls were held between Sunshine Merchants and the defendant without the knowledge of the plaintiff ie the electricity account holder.

(see notes of evidence at pp 124, 127, PWS5 — QA:22; DW18 — pp 737, 739).

[150] As a result of the discussion (see Bundle A1, pp 37–70) *surat akujanji* was signed between the defendant and Sunshine Merchants who purportedly acted on the plaintiff's behalf.

(see notes of evidence — DW19 pp 770–771, 776; DW20 — pp 810–811).

[151] According to the *surat akujanji* the plaintiff purportedly admitted the liability and quantum of alleged tampering. The plaintiff also purportedly agreed to withdraw suit 113 filed against TNB for wrongful disconnection in 2014.

[152] From the evidence presented during the trial, this court finds that the defendant had proceeded with the *surat akujanji* with Sunshine Merchants (a third party) purportedly on the basis of the MOU despite the defendant's knowledge that:

(a) Ice Man and the plaintiff are two different entities (PW5 p 122) (PW5 p 124);

(b) there was no letter of authorization by the plaintiff to Sunshine Merchants in effecting the purported dealings as captured in the letters of undertaking (DW19 p 757);

(c) there was no sales and purchase agreement and the MOU was non-binding (DW19 p 761); and

(d) the defendant could only discuss the purported subjects concerning the letters of undertaking with the consumer itself ie the plaintiff as it affected the rights and interests of the plaintiff (DW19 p 749).

[153] I am of the view based on the above, the defendant was liable and infringing the plaintiff's right as a registered electricity user by divulging the plaintiff's account's detail to Sunshine Merchants (a third party) without the plaintiff's consent.

[154] Accordingly, this court made an award in the sum of RM20,000 for general damages against the defendant.

Whether the defendant's officer and/or representatives had committed trespass to the plaintiff's premises on 19 August 2015 at 2.57am

[155] The provisions on the right of entry into the consumer's premises are governed under s 5 of the ESA 1990 and reg 7 of the Licensee Supply Regulations 1990.

[156] Section 5 of the ESA 1990 reads as follows:

> Power of entry by warrant or otherwise, inspection, examination, seizure, etc
>
> (1) An authorized officer may, for the purposes of discharging any of his duties or carrying out any of his functions under this Act or any regulation made thereunder, or otherwise for any of the purposes of this Act or any regulation, enter at any reasonable time upon any land, house or building with or without supply of electricity to inspect and examine any part of an installation or equipment, or for other proper cause.
>
> (2) In every case where information is given on oath to any magistrate that there is reasonable cause for suspecting that there is in any land, house or building any article, thing, book, document, installation or part thereof used or intended to be used in relation to which any offence under this Act has been committed, he shall issue a warrant under his hand by virtue of which any authorized officer or police officer not below the rank of Inspector named or referred to in the warrant may enter the land, house or building at any reasonable time by day or night, and search for and seize or seal any such article, thing, book, document, installation or part thereof:
>
> Provided that if an authorized officer or police officer not below the rank of Inspector is satisfied upon information received that he has reasonable grounds for believing that by reason of delay in obtaining a search warrant, any article, thing, book, document, installation or part thereof used to commit or to be used to commit an offence under this Act is likely to be removed or destroyed, he may enter such land, house or building without a warrant and seize or seal any such article, thing, book, document, installation or part thereof from therein.
>
> (3) An authorized officer or a police officer not below the rank of Inspector making the search may seize any article, thing, book, document, installation or part thereof used or intended to be used or capable of being used for the purpose of committing an offence under this Act and if such article, thing, book, document, installation or part thereof is seized, he shall produce the same before the magistrate, and upon such production the magistrate shall direct the same to be kept in the custody of the authorized officer or the police for the purpose of any investigation or prosecution under this Act.

[157] Section 2 of the ESA 1990 defines 'authorised officer' as 'any public officer or officer of the commission who is authorised in writing by the Minister for the purposes of this Act'.

[158] Regulation 7 License Supply Regulations 1990 states that:

Entry during continuance of supply

Any officer authorized by a licensee may at all reasonable times, on the production of any duly authenticated document showing his authority, enter any premises to which a supply of electricity is being given by the licensee, or by another licensee (wholly or partly) through the first-mentioned licensee's supply lines and electrical equipment, for any of the following purpose, namely —

(a) inspecting any supply line or electrical equipment belonging to the licensee;

(b) ascertaining the register of any electricity meter; or

(c) removing inspecting or re-installing any electricity meter or installing any substitute meter.

[159] It is to be noted that under s 5(1) of the ESA 1990, an authorized officer may enter into a consumer's premise 'for the purposes of discharging any of his duties or carrying out any of his functions under this Act or any regulation' or 'for any of the purposes of this Act or any regulation' or 'for other proper cause'. This includes entering into the consumer's premise with a view of discovering, seizing and gathering evidence on the commission of an offence under the ESA 1990 as provided under s 5(2) and 5(3).

[160] Whereas, the purposes under reg 7 that may be exercised by any officer authorized by a licensee are only confined to '(a) inspecting any supply line or electrical equipment belonging to the licensee','(b) ascertaining the register of any electricity meter' or '(c) removing, inspecting or re-installing any electricity meter or installing any substitute meter'.

[161] From the above, it clearly shows that under s 5 of the ESA 1990 there is a requirement for authorised officer or police officer not below the rank of Inspector to produce a warrant upon entering the consumer's premises. However there is no requirement for an officer authorised by a licensee who acts under reg 7 to produce a warrant upon entering the consumer's premises. What the authorised officer need to show is any document so validated showing the authority given to the officer by the licensee.

[162] The above definition does not include the defendant ie TNB, the licensee which term has been defined by s 2 as 'a person licensed under Section 9'.

[163] Further, s 6 of the ESA 1990 states that:

6 Powers of investigation

(1) The Commission shall have the power to investigate the commission of any offence under this Act or any regulation made thereunder.

A (2) The Commission may, in relation to any investigation in respect of any offence committed under this Act or any regulation made thereunder, exercise the special powers in relation to police investigation except that the power to arrest without warrant given by the Criminal Procedure Code [Act 593] in any seizable offence may not be exercised by the Commission.

B

[164] The above s 6 give only the Energy Commission and not the defendant ie TNB the power to investigate the commission of any offence under the ESA 1990.

C **[165]** In this context, Lee Swee Seng J (now JCA) in *Kee Jee Piaou v Tenaga Nasional Berhad* [2014] 1 LNS 284 had said as follows:

The reason is obvious. The licensee supplying electricity and hence has an interest in billing the customer for the electricity consumed should not be the one
D investigating an offence under the ESA especially when it is one of tampering of meters. An independent body has already been vested with such powers of investigation and that is the Energy Commission established under the Energy Commission Act 2001. It provides more transparency and engenders greater trust as it is an independent body and not the supplier of electricity who has an interest in
E the outcome of an investigation especially if it perceives its revenue as having been lost through unscrupulous action of the customer. The customer on the other hand has a problem of proving a negative that he has not tampered with the meter in anyway.

F **[166]** It is the submission of the defendant that the defendant has the statutory right to conduct inspections on the meter installation at the plaintiff's premises and it was done with two search warrants granted by the magistrate's court to DW15.

G **[167]** Therefore, the defendant had submitted that the defendant did not commit any trespass onto the plaintiff's premises as the inspections carried out by the defendant is not unjustifiable intrusion as the defendant is empowered by s 38 of the ESA 1990 to conduct inspections at the plaintiff's premises.

H **[168]** The question to be dealt with in the instant case is whether the entry into the plaintiff's premises by a group of at least five employees of the defendant on 19 August 2015 at about 2.57am was justifiable under the law.

I **[169]** It is to be noted that the right of entry together with other functions under s 5 of the ESA 1990 are only exercisable by a police officer not below the rank of Inspector or an authorized officer.

[170] However, DW15, the inspector who applied for the warrants in his evidence had stated that a group of about five persons including himself, an auxiliary police and defendant's employees entered the plaintiff's premises on 19 August 2015 at about 2.57 am. A

[171] It is my view that since the defendant is only a licensee, its employees could never be deemed as the 'authorized officers' within the meaning of section 2 of the ESA 1990. As such, the defendant could not justify itself under s 5 of the ESA 1990 which confers the power of entry and seizure only upon authorized officers of the Energy Commission or police officers not below the rank of Inspector. B C

[172] I am also of the opinion that since s 6 of the ESA 1990 clearly provides that only the Energy Commission has the power of investigation, the defendant as a licensee has no right in investigating seizing and gathering evidence on the commission of an offence under the ESA 1990. D

[173] Further, I find that the two search warrants (D34) were only issued to Zahari bin Md Zuki (DW15) which shows that the order of the court only authorise the entry into the plaintiff's premise only to DW15 and no others. E

[174] I am not surprised that the search warrants (D34) was issued to DW15 as the warrants can only be issued to an 'authorised officer' or a police officer not below the rank of inspector such as DW15. Be that as it may, the other employees of the defendant were therefore cannot enter onto the plaintiff's premises. F

[175] Therefore, I am of the view that DW15, by joining and condoning the defendant's employees in entering the plaintiff's premise had abused the right of entry and thereby committing trespass ab initio. To me, DW15's act is consider an unlawful from the very beginning, however innocent DW15 conduct may have been up to the moment of abuse G

[176] I find support in this context, in the case of *Azizah bte Zainal Abidin & Ors v Dato' Bandar Kuala Lumpur* [1999] 5 MLJ 405 at p 410, where James Foong J (as he then was) said as follows: H

> Refusing to concede, the plaintiffs submitted that even if the works fall within the scope of s 53(1) of the Act, and reasonable notice was given in accordance with the proviso thereto, the defendant was still a trespasser by committing 'trespass ab initio'. To explain this Latin phrase, En Azahar quoted a text from Winfield Jolowicz on Tort (13th Ed) at p 36 which states: I
>
> When an entry upon land or other prima facie trespass is justified by authority of the law itself, then, according to an ancient doctrine of the common law, if the actor abuses his authority he becomes a trespasser ab initio; his act is reckoned as unlawful

from the very beginning, however innocent his conduct may have been up to the moment of the abuse. The doctrine applies only if the authority is that of the law, not that of other party concerned, and the abuse must be by positive act, not a mere omission.

[177] Based on the above, I am of the opinion that the entry into the plaintiff's premise by a group of about five persons acting for the defendant on 19 August 2015 at about 2.57 am was not justifiable under the law and the defendant had therefore committed trespass onto the plaintiff's premise.

[178] I am of the view that even if no damage is done or the damage caused by the trespass was negligible is not relevant in this court's finding on general damages. Trespass is an actionable per se; without any necessity to prove any damage.

[179] Therefore, taking into consideration that the trespass was committed by five employees of the defendant and at the wee hours of the night and not within reasonable time as stated in reg 7, I am of the view that a sum of RM50,000 as the quantum for general damages is fair and reasonable.

Whether the actions of the defendant amounts to an interference in tort towards the plaintiff and the plaintiff's business

[180] Based on the evidence produced before this court, I find that the plaintiff had failed to prove that the defendant unlawfully interfered in the plaintiff's business as required under the law.

[181] The principles of tort of unlawful interference with trade are succinctly set out by Low Hop Bing J (as he then was) in *Megnaway Enterprise Sdn Bhd v Soon Lian Hock (sole proprietor of the firm Performance Audio & Car Accessories Enterprise)* [2009] 3 MLJ 525 as follows:

> [48] The elements which constitute the tort of unlawful interference with trade or business are:
>
> (1) Interference with the plaintiff's trade or business;
>
> (2) Unlawful means;
>
> (3) Intention to injure the plaintiff; and
>
> (4) The plaintiff is injured thereby.
>
> (See *Bullen & Leake & Jacob's Precedents of Pleadings* [1990] p 464).

[182] In applying the above principles in our case and upon perusal of the evidence presented in this court, I find that the plaintiff had failed to fulfil the requirement as set out in the above case and the plaintiff's claim on the unlawful interference is dismissed.

CONCLUSION

[183] On the grounds above stated, I allow the plaintiff's claim against the defendant as set out in para 111(a), (b), (c), (d), (e), (f), (i), (j), (l) and (m) of the amended statement of claim as follows:

(a) special damages of RM2,907,931.40 arising from the first wrongful disconnection;

(b) special damages of RM652,012.20 arising from the second wrongful disconnection;

(c) general damages of RM20,000 for infringing on the plaintiff's right is a registered electricity user by divulging the plaintiff's account's details to a third party without the plaintiff's consent;

(d) general damages of RM25,000 and aggravated damages of RM25,000 arising from defamation;

(e) general damages of RM50,000 arising from the trespass;

(f) a declaration that the plaintiff had never tampered the MSB 1 and MSB 2;

(g) a declaration that the plaintiff does not owe the defendant the amounts incurred due to the alleged tampering found against MSB 1 during the inspections on 4 December 2013, 6 May 2014, 10 May 2014, 15 October 2014 and 7 January 2015;

(h) a declaration that the TNB demand letter dated 1 February 2016 is null and void.

(i) exemplary damages amounting to 25% of the special damages awarded under para 111(a) and (b) of the amended statement of claim and general damages awarded under paragraph 111(d) of the amended statement claim;

(j) pre-judgment interest of 3%pa on the special damages awarded (RM2,907,931.40) beginning from the end date of the first disconnection of electricity supply on 1 October 2014 until the date of the judgment totalling a sum of RM431,189.70 and prejudgment interest of 3%pa on special damages RM652,012.20 beginning from the end of the second disconnection of electricity supply on 14 May 2015 until date of judgment totalling a sum of RM85,744.09; and

(k) cost RM40,000 to the plaintiff subject to payment of the allocator fees.

Order accordingly.

Reported by Mohd Kamarul Anwar